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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
JEFFERSON F. MOSER, APPELLEE } No. 99

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Jefferson F. Moser on September 29, 1904, while serving in the grade of captain, United States Navy, was placed on the retired list after forty years of service in accordance with Section 1443, Revised Statutes. The letter notifying him of his retirement is set out in the Findings of Fact in the case of *Jefferson F. Moser* v. *United States* (42 C. Cls. 87), as follows:

> NAVY DEPARTMENT,
> *Washington, May 17, 1904.*
>
> SIR: The President of the United States having approved your application for retirement, you are, by his direction, transferred to the retired list of officers of the Navy from September 29, 1904, in accordance with the

provisions of section 1443 of the Revised Statutes of the United States.

Very respectfully,

CHAS. H. DARLING,
Acting Secretary.

Captain JEFFERSON F. MOSER, *U. S. Navy,*
Commandant Naval Training Station,
San Francisco, Calif.

The court below held in said case that during his entire service the record of Moser was creditable. At the date of his retirement Moser was retired as of the rank of captain, and he has been so held on the rolls of the United States Navy ever since said date. Moser on February 4, 1907, recovered judgment in the Court of Claims against the United States for the sum of $2,537.50. (42 C. Cls. 86.) The court found in said case as follows (p. 88):

> The ultimate fact, so far as it is a question of fact, that the claimant's service as a midshipman in the Naval Academy from September 29, 1864, to the close of the War of the Rebellion was creditable service "during the civil war."

The court below therefore held that Moser when placed on the retired list was entitled to have been retired as a rear admiral, lower half, with a salary at the rate of $4,500 per annum, and the difference of pay allowed him by the judgment of said court was for the period up to and including the 31st day of December, 1906. Moser brought a second suit in the court below for difference in pay of rear admiral of the lower half and of captain from January 1,

1907, to February 9, 1914, and judgment was rendered in his favor February 9, 1914, in the sum of $5,843.73. (See 49 C. Cls. 285.)

Moser continued since the 9th day of February, 1914, to be rated as a captain on the retired list of the Navy, and he was recalled to active duty as captain on April 6, 1917, and continued on active duty until relieved and detached on June 15, 1919. He then reverted to an inactive status as retired captain in the United States Navy. Moser brought a third suit in the court below for difference in pay as a rear admiral of the lower half and as a captain from February 9, 1914, to December 31, 1917. He recovered judgment in the court below on June 3, 1918, in the sum of $3,101.38. (See 53 C. C. 639.)

Moser then brought suit against the United States in the Court of Claims by petition filed June 22, 1922, reciting and setting out the preceding actions and claiming judgment for the difference in pay as a rear admiral of the lower half and as a captain from January 1, 1918, to March 15, 1923. His claim was based on Section 11 of the Act of March 3, 1899 (30 Stat. 1007), which section reads as follows:

> Any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.

The court below on March 19, 1923, gave judgment for Moser for the difference in pay up to March 15, 1923, in the sum of $4,270.83.

The court in so rendering judgment based it on the following reason (R. 6, 7):

> This case is decided upon the authority of *Moser* v. *United States*, 42 C. Cls. 86, and *Moser* v. *United States*, 49 C. Cls. 285, and the case of *Moser* v. *United States*, 53 C. Cls. 639. * * * When, however, the court came to consider the second Moser case, 49 C. Cls. 285, it reaffirmed the first Moser case, and decided that the questions involved were *res judicata*. That case was followed by the third Moser case, 53 C. Cls. 639, reaffirming the first and second Moser cases upon the ground of *res judicata;* and we see no reason for changing our views as to the case at bar, which involves the same questions decided in the former three Moser cases.

The court below then set down the following additional reason for giving judgment in favor of Moser (R. 7):

> The plaintiff was retired under the act of March 3, 1899, 30 Stat. 1007, and under that act the court held that service as a cadet constituted service during the Civil War within the meaning of that act. The act of June 29, 1906, in terms provided that service as a cadet should not be accounted service during the Civil War in the application of the act of March 3, 1899, but there was a proviso attached to the act of June 29, 1906, which reads as follows: "*Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the

Navy and placed on the retired list by virtue of the provisions of a special act of Congress." This proviso was manifestly intended for the benefit of officers who were on the retired list at the date of the passage of this act. The plaintiff was on the retired list then, and had been for some years, and had received at the date of his retirement an advance of grade, and therefore the provisions of the act did not then and do not now apply to him.

ASSIGNMENTS OF ERROR

First. The court erred in holding that the questions involved in this case were *res judicata*.

Second. The court erred in holding that service as a cadet during the Civil War prior to April 9, 1865, entitled Moser to be retired with the rank and pay of a rear admiral of the lower half for the reason that Moser "had received at the date of his retirement an advance of grade," and therefore the provisions of the Act of June 29, 1906, did not then and do not now apply to him.

ARGUMENT

I

The court below erred in holding that the questions involved in this case were *res judicata*

The question that was raised in the first action brought by Moser, in which judgment was recovered on January 4, 1907, was whether he was entitled, under the provisions of Section 11 of the Act of March 3, 1899 (30 Stat. 1007), known as the Navy

Personnel Act, to have been retired with the rank and consequent pay of a rear admiral of the lower half, as said section provided:

> That any officer of the Navy, with a creditable record, who served during the Civil War shall, when retired, be retired with the rank and three-fourths of the sea pay of the next higher grade.

Moser, being a captain at the time of his retirement, contended that he was entitled to be retired with the rank and retired pay of the next higher grade—that of rear admiral of the lower half. This upon the ground that he had a creditable record and had served during the Civil War. The court below held in that case that under the said provision and under the facts, undisputed, of the record of the claimant, he was entitled to be so retired as a rear admiral and gave him judgment for the difference in pay.

On April 20, 1908 (43 C. C. 368), there was decided by the Court of Claims the case of *Jasper* v. *The United States*. Jasper was in a similar situation to Moser, and the court, after full consideration of the law as applicable to the facts of the case, rendered a judgment of dismissal against Jasper. There was called to the attention of the court below a statute which had been enacted on June 29, 1906 (34 Stat. 554), in the following words:

> That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular

> or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the Official Register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided,* That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress.

In the opinion of the court below it is stated that neither in the case of Moser or the original case of Jasper, when under consideration, was the court's attention called to this statute, and no reference was made thereto; that if the statute had been brought to the attention of the court when the original Moser case was considered the court would not, in the face of that statute, have given judgment for the claimant.

When Moser brought his second action against the United States the defense was set up against his claim of the provision of the Act of June 29, 1906 (34 Stat. 554). On consideration of the argument then made the court held that the judgment

given in the first case of *Moser* v. *The United States* (42 C. Cls. 86) should be reaffirmed and followed. The court held since the questions involved in the second case were similar to those involved in the first and, therefore, the matters in entire controversy were *res judicata*, judgment should be given in favor of Moser.

In the determination of the second case brought by Moser (49 C. Cls. 285, 290–292), Judge Barney, delivering the opinion of the court, said:

> At the time this former *Moser case* was presented to the court neither one of the parties called the attention of the court to the provision of the Act of June 29, 1906 (34 Stat. 554). * * *.
>
> In fact, the court and the attorneys engaged in that case were at that time ignorant of the existence of that statute.
>
> A little more than a year after the trial of the former *Moser case* the case of *Jasper* v. *United States* (43 C. Cls. 368) came before this court, in which the same question was involved, and in that case attention, was called to the act of June 29, 1906. It was considered and construed and this court decided that it deprived Jasper of the right to reckon service at the Naval Academy during the "Civil War" as "service during the Civil War" within the meaning of section 11 of the act of March 3, 1899, *supra*. This reversed the ruling of the court in the former *Moser case*, and the court remarked in its opinion that if the provisions of the

act of June 29, 1906, had been called to the attention of the court the result would have been the same in both cases.

It will thus be seen that the question is presented to the court in this case whether the decision and judgment in the former *Moser case* (42 C. Cls. 86) is *res judicata* as to the claimant's status as to pay as a retired naval officer.

* * * * *

If we admit that this court was in error in the former *Moser case* in the construction of the statute then in force as to the retired pay of officers (and that is, at least, somewhat doubtful), this error as affecting the rule of *res judicata* would not differ from an error as to any rule of the common law. Where the law of a case is settled by adjudication it is settled as to statute law as well as the common law. When a suit has been tried in a court of competent jurisdiction it is a legal presumption amounting to a conclusion that every issue of law involved in it has been tried and decided.

Appellant respectfully represents to the court that the application of the principle of *res judicata* to the circumstances of the first *Moser case*, and on which principle judgment was rendered for Moser in the succeeding cases, including the present case, is erroneous.

(1) In the case of *Board of Commissioners of Lake County, Colorado* v. *Sutliff*, determined in the Circuit Court of Appeals of the Eighth Circuit (97 Fed.

Rep. 270), the consideration of the question as to when an earlier judgment can act as an estoppel on the principle of *res judicata*, is clearly and forcibly set out. The action was on coupons of municipal bonds issued by the Board of Commissioners of said Lake County. It was held by the court that an action on coupons from municipal bonds is not upon the same cause of action as a former action on different coupons from the same bonds, and hence the judgment in the first action renders *res judicata* in the second only such issues as were actually raised, litigated and determined in the first suit. The language of Judge Sanborn in the decision of said action clearly determines the conditions on which the principle of *res judicata* is to be applied. He says (pp. 273–274):

> There are two grounds on which an earlier judgment in an action between the same parties may constitute a conclusive estoppel respecting the issue in a subsequent suit. The first ground is that the later suit is founded upon the same causes of action upon which the former action was based. In a case where this is the fact, the former judgment is conclusive in the subsequent litigation, not only of every issue which was raised and determined, but also of every question which might have been presented by either party and might have been determined by the Court in that suit. The second ground is that the subsequent action is founded on different causes of action, but that the issues which it presents were actually raised, litigated and determined

> in the earlier suit. In a case in which the second action is upon different causes of action from those involved in the first, the former judgment, though between the same parties, operates as an estoppel only as to the points and questions actually litigated and determined and it leaves the parties free to contest and try *de novo* every issue and controversy which might have been, but which was not in fact, litigated and decided in the earlier action.

While the parties and the subject matter in this case are identical with those in the three former cases of Moser, the cause of action is not identical. All that the court below could pass upon and determine is the question as to whether the appellee was entitled to a money judgment against the United States. The sole question in dispute in the preceding actions of Moser was whether the claimant was entitled to a judgment for difference in pay for certain specific periods. He now claims that he was entitled to be credited with an additional amount and the court below gave judgment for said difference in pay from January 1, 1918, to March 15, 1923. The pay of Moser during this period gave rise to a distinct claim to said payment as against the United States, which claim differs from the claims adjudicated and passed upon in the preceding Moser cases. The failure of the United States to allow Moser the payment he claimed gave rise to a distinct cause of action at each successive period when said pay, in the opinion of Moser, was due and was not received. The said causes of action are separate and distinct and Moser

can not here contend that the question as to whether he was entitled to said pay at any period since January 1, 1918, is *res judicata*, since the court below has never pronounced upon the merits of said question.

In *Dennison* v. *United States* (168 U. S. 241), which was an action by a supervisor for fees and disbursements, plea of *res judicata* was made that in a former suit for items of service of the same nature and description as those claimed in this case, the Court found in claimant's favor. The Court said (p. 249):

> * * * The suit under consideration is not for the *same* items as those allowed in the former case, but for *similar* items, and the case falls within our ruling in *Cromwell* v. *County of Sac* (94 U. S. 351), that "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." There was no issue raised and decided in the former case as to the legality of the several items considered separately, but such issue is clearly raised in this case.

Cromwell v. *County of Sac* (94 U. S. 351) was an action on four bonds and attached coupons. To defeat the action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action upon certain earlier maturing coupons which were the property of the same owner and presented for his sole use and benefit.

The Court said (pp. 352, 353):

> In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every

ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the claim or demand in controversy. Such demand or claim having passed into judgment can not again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the injury must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

(2) The court below, in the decision in the second *Moser case*, which has been followed in the subsequent cases, in effect held that it could not consider in a subsequent suit an express statutory enactment which was confessedly overlooked in the former suit because "when a suit has been tried in a court of competent jurisdiction it is a legal presumption amounting to a conclusion that every issue of law involved in it has been tried and decided." And yet

the court below, both in the decision of the *Jasper case* and in the decision of the second *Moser case*, specifically stated that the consideration of the statute of June 29, 1906, was never before the court and that the court was in absolute and utter ignorance of the existence of such statute when the first *Moser case* was decided. In the subsequent cases brought by Moser the court held, however, that the original *Moser case* was *res judicata*, and would not consider the effect of this statute as a good and sufficient bar and defense to the renewed claims made by Moser. In other words, the court below practically assumed the position that there was a legal presumption, amounting to a conclusion, that every issue in law had been tried in the first *Moser case* and, therefore, that this statute had been considered by the court. Yet, at the same time, the court twice in written opinion declares that said statute never was considered by it. The contradiction is evident. Bigelow on Estoppel (p. 112) states:

> But though verdict estoppels apply in a different as well as in the same cause of action, it must not be supposed that the parties would be estopped by a judgment in one cause of action from disputing, in another cause of action, the doctrines of law applied in the first. The facts decided in the first suit can not be disputed, and for the purpose of the conclusiveness of those facts, but no further, the law applied must be accepted. Thus, if a decree in a suit to declare

> a mortgage invalid proceed upon the constitutionality of a statute, the parties can not afterwards deny the validity of the statute in question when the mortgagee attempts to foreclose. But it could hardly be true that they could not raise the question again in a suit upon a different subject matter; and the same would appear to be the case with regard to any other question concerning the state of the law. What is law for one must be law for all; and there could be no advantage in extending the doctrine of *res judicata* to such cases.

In a suit between the same parties upon another, though similar, cause of action, the parties are not precluded from contesting the constitutionality or existence and force of a statute which was not alluded to or brought to the attention of the court in the former suit. (*Boyd* v. *Alabama*, 94 U. S. 645; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Philadelphia* v. *Railway Co.*, 142 Pa. St. 484; *Dobbins et al.* v. *First National Bank*, 112 Ill. 554–561.)

In *Boyd* v. *Alabama* (94 U. S. 645) it was stated that in a former case against the same defendant, upon an indictment of a similar kind, it was held that a repealing statute was void. In that case the constitutionality of the act was not drawn in question. In the case presented it was. The Court said (p. 648):

> Courts seldom undertake, in any case, to pass upon the validity of legislation where the question is not made by the parties.

> Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then they will construe the Acts presented for consideration, define their meaning, and enforce their provisions. The fact that Acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases nor conclude the court upon the constitutionality of the Acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the Act of 1868, the court was not precluded by the previous decisions from freely considering and determining it.

In *South Ottawa* v. *Perkins* (94 U. S. 260, 267) it was held:

> * * * There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an Act of Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State.

> And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.

Philadelphia v. *Railway Company* (142 Pa. St. 484) was an action to recover taxes under a statute of the State. In a prior suit taxes had been so collected, but the point of the constitutionality of the act had not been mooted. In this case it was; and it was claimed that the validity of the statutory provision imposing the tax was necessarily involved in the prior action and, therefore, the company was estopped. The court said (p. 493):

> The argument of the company's counsel now is that, although, in the case referred to, the point does not appear to have been made or decided, yet the constitutionality of the act of 1872 must be taken to have passed in *rem judicatam;* that the judgment in that case necessarily involved a decision that the statute imposing the tax was to that extent valid, and, although the cause of action is not the same, the city is estopped of record from relitigating that question. In support of this doctrine they cite *Beloit* v. *Morgan* (7 Wall. 619), *Aurora City* v. *West* (7 Wall. 85), *Durant* v. *Essex Co.* (7 Wall. 107), *Corcoran* v. *Canal Co.* (94 U. S. 741), *Wilson* v. *Deen* (121 U. S. 525), and *Duchess of Kingston's case* (2 Smith Lead. Cas., 8th ed., 941).
>
> Whilst the general rule declared in these authorities is undoubtedly correct, it does not

extend to estop a person from setting up the unconstitutionality of a statute when the cause of action is not the same. The former judgment is absolutely conclusive upon the parties as to the cause of action involved in it, although the statute upon which the proceedings were taken was not constitutional; that judgment can only be impeached collaterally for fraud or want of jurisdiction. It is a matter of no consequence now that the act of 1872, upon which judgment was entered for the amount of the tax, was unconstitutional and void; judgment having been entered, and no appeal taken, the subject matter of the issue in that suit is *res judicata*. The former judgment, therefore, operates as a bar to any subsequent action founded on the same demands. (Bigelow on Estop., 80–88.) In the case at bar, however, whilst the point in issue may perhaps be the same, the cause of action is different; and, although the verdict with the judgment thereon would furnish conclusive evidence of the matters in controversy upon which the verdict was rendered, and operate as a bar to further litigation thereof, it would not preclude the plaintiff in this suit from asserting the unconstitutionality of the act upon which the previous action proceeded: Bigelow on Estop., 90–103.

In *Dobbins et al.* v. *First National Bank* (112 Ill. 554, 561), which was a case involving the construction of two statutes relating to judgment and execution liens on real estate, the latter repealing the former, upon a

motion for rehearing at a subsequent term, the court, referring to the previous opinion, said (pp. 561, 563):

> The opinion then proceeded to dispose of the case upon the hypothesis it was to be governed by the provisions of the act of 1872 and not of 1845, which necessarily led to a reversal of the judgment of the Appellate Court. Had the provisions of the act of 1845, and not of 1872, been applied to the case by this court, it would of course have led to an affirmance instead of a reversal of the judgment. It follows, therefore, the only question now to be considered is, whether the trial court, in applying the act of 1845, as it must have done, committed an error for which the decree should have been reversed by the Appellate Court.
>
> * * * * *
>
> When the case was first before us for consideration our attention was not called to the sixty-sixth section, and the decision then announced was made without any reference to it; hence the conclusion reached. In the present presentation of the case that section is called to our attention, and, as already shown, it becomes an important factor in arriving at a proper conclusion in it. Giving it the effect already indicated, it follows, notwithstanding the act of 1872, the act of 1845 was continued in force as to the Dobbins judgment.

The judgment was set aside and a judgment of affirmance rendered.

Wentworth v. *Racine County* (99 Wis. 26) was a case for the recovery of fees. On the trial the record

of a former case between the same parties, for the recovery of fees, was introduced in evidence, but there was no evidence to show that the validity of the law was called in question. The court said (pp. 231, 232):

> The fact that in another case, on a different cause of action, the validity of the law in question might have been determined does not make the judgment there rendered *res adjudicata* in this case, in the absence of evidence to show that the question was actually presented to the court and decided and became a part of the judgment. The doctrine of the conclusiveness of a former adjudication does not go so far as to make such adjudication in one case necessarily binding between the same parties in another case, involving questions that might have been decided in the former. The general rule is often stated by courts and text writers that a judgment in bar, or as evidence in estoppel, is binding not only as to every question actually presented and considered and upon which the court rested its decision, but as to every point that might have been presented and decided in the case, and that is strictly accurate when applied to the cause of action in which the adjudication occurs, whether in the same or in some other case, but not when the same question is subsequently raised between the same parties on a different claim or cause of action. In the latter situation the former judgment is binding only as to matters actually presented and litigated in the former case. To make the

> rule applicable literally, there must be an identity of parties, an identity of subject matter, and an identity of cause of action. In *Cromwell* v. *Sac Co.* (94 U. S. 351), Mr. Justice Field, speaking for the court, very clearly points out the difference between the effect of a judgment in the same action, or in regard to the same cause of action, and when it is resorted to as an estoppel between the same parties upon a different claim or cause of action. Here there is no proof that the precise question upon which this case turned was presented in the former case and decided; therefore, though apparently such question might have been decided, the judgment does not affect the plaintiff's right to recover one way or the other.

In *Nesbitt* v. *Independent District*, &c. (144 U. S. 610, 621), the Court held:

> This case may be looked at in another light. The defense pleaded in the Des Moines suit was that at the time of the issue of the two bonds then disclosed there was a prior indebtedness of the district exceeding the constitutional limitation; and that defense was the one adjudged to be precluded by the recitals. Here an additional defense is, that the five bonds in suit themselves created an overissue. That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case. It is of itself a valid defense, irrespective of prior indebtedness. So we have in this case a new question not presented

> in the Des Moines suit, the existence of facts never called to the attention of the court in that case, which of themselves create a perfect defense.

The courts have thus repeatedly held that while a judgment may be relied upon as an estoppel, so that the actual judgment can not be disputed, *yet, even the question of the applicability of the law or statute which has been called to the attention of the court in the case, and which has been considered by the court, in passing upon the facts of the case, is not binding as res judicata when raised under a subsequent aspect in a second action between the same parties and in the same court.*

The defendant would further cite to the court the decision of the Supreme Court of New Jersey, reported in 27 N. J. Law 412 in the case of *Bernard* v. *City of Hoboken*. The decision of the court in that case is pertinent and applicable in this case. It was an action brought to recover salary as Chief of Police from June 20, 1856, to June 23, 1857. The appointment of Bernard, service until January 20, 1856, and his discharge on that date and payment of salary until that time were admitted. Judgment had been given in a former action for salary from January 20, 1856, until June 20, 1856. The decision of the court, in the second action brought by Bernard, is set out as follows in the syllabus:

> Where a person recovers a judgment for salary for a certain period and afterwards brings a suit for salary for a subsequent period, on the trial of the second cause the defendants

may show that the plaintiff was legally discharged from service before the commencement of the term for which he claimed salary and recovered in the first suit.

The first judgment is conclusive upon the facts only so far as that case is concerned; it does not prevent the same facts being controverted in a second case founded upon a distinct cause of action.

If the decision of the Court of Claims in the three cases which have been brought by Moser since judgment rendered in his first action is allowed to stand by this court and is not reversed, the intolerable condition set out by the Supreme Court in the *case of Perkins* would result. For, as a consequence of sustaining the position of the Court of Claims, the Act of June 29, 1906, would be a law in one case and for one party and would not be a law in another case and for another party. This is a condition which can not be justified under guise of the doctrine of estoppel.

II

The court below erred in holding that service as a cadet during the Civil War, prior to April 9, 1865, entitled Moser to be retired with the rank and pay of a rear admiral of the lower half, for the reason that Moser "had received at the date of his retirement an advance of grade," and therefore the provisions of the act of June 29, 1906, did not then and do not now apply to him

Although the court below laid down that the entire question raised by the United States as to the right of Moser to the pay of a rear admiral of the lower half could not be considered, since the entire matter

was *res judicata* under the decision in the three preceding Moser cases, yet the court proceeded in the second place to consider the question *de novo* and upon said consideration give judgment for Moser. The position of the court is based upon a misapprehension of the effect of the Act of June 29, 1906.

Moser, according to the findings of the court (42 C. Cls., pp. 87, 88) was retired in accordance with the provisions of Section 1443 of the Revised Statutes of the United States. The court found under Finding V, that when an officer was retired with increased rank under Section 11 of the Navy Personnel Act of March 3, 1899, a letter was written of which a specimen was therein set forth. The court will note that the actual letter notifying Moser of retirement did not retire him in accordance with the provisions of the act of March 3, 1899, but solely in accordance with the provisions of Section 1443 of the Revised Statutes. Moser was retired as captain and has ever since been so held on the rolls of the U. S. Navy.

The Act of June 29, 1906, prevented the retirement with rank and retired pay of one grade above that actually held by the officer at the time of retirement, if his sole service during the Civil War prior to April 9, 1865, was that of a cadet. It provided, however, that this Act should not apply to any officer who received an advance of grade at or since the date of his retirement. The judgment in the first action brought by Moser was made on January 7, 1907, six months after the passage of the Act

of June 29, 1906. The Act of June 29, 1906, clearly applied to Moser. He was during the Civil War a cadet or midshipman, having been appointed a midshipman at the Naval Academy on September 29, 1864. Moser was thus deprived at the time of the passage of this Act of the right to reckon service at the Naval Academy during the Civil War as "service during the Civil War" within the meaning of Section 11 of the Act of March 3, 1899. This is unquestionable, unless he fell under the exception contained in the proviso attached to the Act of June 29, 1906. The court below held that he fell under this proviso and that the Act did not apply to him because he "had received at the date of his retirement an advance of grade."

There is no question under the Findings of Fact made by the Court of Claims below in the first Moser case that Moser's retirement was not under the provisions of Section 11 of the Act of Congress of March 3, 1899. This is undoubtedly true as a matter of fact, since the original action of Moser and each of his subsequent actions is based on allegations that he was not so retired but was retired under the provisions of Section 1443 of the Revised Statutes with the rank he held at the time of retirement, namely, that of captain. He therefore did not receive at the date of his retirement an advance of grade, nor has any advance of grade been allowed him since by the Navy Department, as is evident by his successive actions to recover the difference in pay. The court therefore erred in its reasoning

when it said that Moser "had received at the date of his retirement an advancement of grade." What the court should have stated was, that in accordance with its decision in the first action of Moser he should have been retired with an advancement of grade to rear admiral, lower half. Therefore, the proviso of the Act of June 29, 1906, to the effect that this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement does not apply to Moser, and he falls under the general terms of the Act. The Act provides that service as a cadet should not be accounted service in the Civil War in the application of the Act of March 3, 1899. It could not, therefore, be so accounted in the case of Moser, and Moser therefore could not be held retired with the rank and retired pay of one grade above that actually held by him at the time of his retirement. He therefore could only have been retired under the law, as it actually stood at the time of the rendition of the judgment in his first action, in accordance with the provisions of Section 1443 of the Revised Statutes with the rank of captain.

The court below, in its reasoning on the merits of the case, does not attempt to controvert the reasonings of Chief Justice Peelle in the *case of Jasper* (43 C. Cls. 368), to the effect that the Act of June 29, 1906, was retroactive. The Act of June 29, 1906, Chief Justice Peelle argued (pp. 372, 373):

> controls and operates to amend, if it does not supersede, Section 11 of the Act of March 3, 1899, respecting the character of the service required during the Civil War as a basis for

> the rank and retired pay of the next higher grade. The Act goes further, and in express terms applies to those who have heretofore been, or may hereafter be retired, so that the language of the Act in express and unambiguous terms is retroactive. Indeed, the Act may be considered as the legislative construction of Section 11, and as such entitled to weight, if not conclusive * * *. His (like Moser's) application to be retired in the next higher grade under the provisions of said Section 11 of the Act of March 3, 1899, was denied by the Secretary of the Navy upon the ground that claimant's service while in the Naval Academy was not service during the Civil War. Here was a construction by the Navy Department against claimant's right to retire with the rank and three-fourths the sea pay of the next higher grade. The Act under consideration, of June 29, 1906, in effect ratified that ruling.

The reasoning on which the court below attempts upon the merits of the case, putting to one side the question of *res judicata*, to sustain a judgment in favor of Moser, is not sound and can not be followed when the acts are carefully considered.

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